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Decision

Matter of: Financial & Realty Services, LLC

File: B-422858

Date: November 25, 2024

Eden Brown Gaines, Esq., Brown Gaines, LLC, for the protester.
Megan R. Nathan, Esq., and Anthony E. Marrone, Esq., Department of Health and Human Services, for the agency.
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DIGEST

Protest challenging the agency's decision to cancel a Federal Supply Schedule (FSS) procurement set aside for small businesses is dismissed for failure to state a valid basis of protest because set-asides under the FSS are discretionary.

DECISION

Financial & Realty Services, LLC (FRS), a small business of Calverton, Maryland, protests the cancellation of request for quotations (RFQ) No. 75P00124Q00007, issued by the Department of Health and Human Services (HHS), as a Federal Supply Schedule (FSS) purchase of facilities maintenance, management, and repair services at the Hubert H. Humphrey Building in Washington, D.C. FRS argues that the agency improperly canceled the solicitation, which anticipated establishment of a blanket purchase agreement (BPA) with a small business.

We dismiss the protest.

BACKGROUND

On May 10, 2024, in accordance with Federal Acquisition Regulation (FAR) subpart 8.4, HHS issued the RFQ to vendors holding General Services Administration (GSA) multiple award schedule contracts for special item number (SIN) 561210FAC (facilities maintenance, management, and repair). The RFQ was issued through the GSA eBuy

website under eBuy ID RFQ No. 1695390.¹ COS at 1.² The solicitation anticipated establishment of a single fixed-price BPA with an estimated value of \$29 million for a 1-year base period with four 1-year options. AR, Tab 3, RFQ at 4. The RFQ provided for establishment of the BPA with the vendor whose quotation represents the best value to the government using a tradeoff process that considers technical, price, and past performance factors, in descending order of importance, and where the combined non-price factors are significantly more important than price. *Id.* at 128-129.

HHS initially issued the RFQ as a service-disabled veteran-owned small business (SDVOSB) set-aside in eBuy and instructed SDVOSB FSS contract holders to submit quotations on or before July 3. COS at 2. The agency received only one quotation. *Id.* In accordance with FAR section 8.405-3(b)(2)(v), the agency considered whether additional vendors were capable of fulfilling its requirements because the agency did not receive three quotations in response to the RFQ. *Id.* The agency concluded that other vendors, non-SDVOSB vendors, could fulfill the requirements and cancelled the RFQ set-aside for SDVOSBs. *Id.*

On July 3, HHS reissued the solicitation as a small business set-aside under a different eBuy ID number--eBuy ID RFQ 1706871--to all small business FSS contract holders. *Id.* By the August 9 deadline for receipt of quotations, the agency received two quotations, including FRS's quotation. *Id.* Again, the agency failed to obtain three quotations and considered whether additional contractors were capable of fulfilling its requirements pursuant to FAR section 8.405-3(b)(2)(v). *Id.* at 3. The agency determined other firms were able to fulfill its requirements and cancelled the small business set-aside. *Id.* On August 13, 2024, the Agency reissued the FSS procurement to all contract holders without restrictions under eBuy ID RFQ No. 1717903. *Id.*

Concurrently, HHS notified FRS and the other vendor that because the agency "didn't get enough interest" in the procurement from small businesses, the agency had canceled the small business set-aside and reissued the RFQ as "full and open." AR, Tab 10, Email Communications between HHS and FRS at 2. In response, FRS contacted the agency and asked how many quotations had been received, whether the agency had evaluated any of the quotations, and what, if any, results there were of the agency's evaluation of FRS's quotation. *Id.* at 1-2. HHS informed FRS that two quotations had been received and that no quotations had been evaluated. *Id.* at 1. This protest followed.

DISCUSSION

¹ The RFQ mistakenly identifies GSA SIN 334512, facilities management services. Agency Report (AR), Tab 3, RFQ at 3. The SIN is not an issue in this protest, however, and the current version of the RFQ on eBuy identifies the correct SIN. Contracting Officer's Statement (COS) at 1 n.1.

² Citations to the record use the Adobe PDF or Microsoft Word pagination of documents produced in the agency report.

The protester challenges the agency's decision to cancel the solicitation set aside for small businesses. First, the protester argues that applicable statutory and regulatory provisions required the agency to evaluate the two quotations received for price reasonableness before deciding to cancel the solicitation. Protest at 3-4. Second, the protester argues that the agency violated regulations governing small business procurements by failing to notify the Small Business Administration (SBA) of the agency's decision to cancel the set-aside in accordance with FAR section 19.502-9. Protest at 4. For the reasons discussed below, we conclude that FRS fails to state a valid basis of protest.

Our Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4) and (f), require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

FRS asserts that based on FAR section 19.502-9, HHS may cancel a small business set-aside only if the agency does not receive a reasonably priced quotation from a responsible small business.³ Protest at 3. The protester argues that because the agency did not evaluate the quotations received, the agency does not know whether FRS or the other vendor submitted reasonably priced quotations, and therefore cancellation was improper. Protest at 4. HHS responds that the SBA regulations and FAR part 19 provisions do not apply to the FSS procurement here and the protest should be dismissed. Memorandum of Law at 3-6.

By way of background, the Small Business Act, 15 U.S.C. § 644(a), states that "small business concerns shall receive any award or contract" if it is in the interest of "assuring that a fair proportion of the total purchase and contracts for good and services . . . are awarded to small business concerns." 15 U.S.C. § 644(a). As implemented in the SBA regulations and the FAR, this statutory provision, referred to as the "rule of two," requires agencies to set aside the procurement for small businesses if it is valued over

³ Section 19.502-9(a) of the FAR provides in relevant part that:

If, before award of a contract involving a total or partial small business set-aside, the contracting officer considers that award would be detrimental to the public interest (e.g., payment of more than a fair market price), the contracting officer may withdraw the small business set-aside, whether it was unilateral or joint. The contracting officer shall initiate a withdrawal of an individual total or partial small business set-aside, by giving written notice to the agency small business specialist and the SBA [procurement center representative] . . . stating the reasons.

FAR 19.502-9.

the simplified acquisition threshold and there is a reasonable expectation of receiving fair market offers from at least two small business concerns. 13 C.F.R. § 125.2(f)(2); FAR 19.502-2(b).

In 2010, Congress amended the Small Business Act to address small business set-asides under multiple award contracts. Specifically, section 1331 of the Small Business Jobs Act of 2010, Pub. L. No. 111-240, added a provision that required the Administrator for Federal Procurement Policy and the SBA Administrator, in consultation with the GSA Administrator, to publish regulations by which agencies, “may, at their discretion” set aside orders placed against multiple award contracts for small business concerns. 15 U.S.C. § 644(r). In response, SBA’s regulations and the FAR were amended to implement this statutory provision to state that contracting officers “may, at their discretion” set aside for small businesses orders placed against FSS contracts. 13 C.F.R. § 125.2(e)(6)(i); FAR 8.405-5. Indeed, the FAR provisions implementing the statutory small business provisions and the FSS program expressly state that the set-aside requirements of FAR part 19 do not apply to FSS procurements, except for certain discretionary actions and provisions not relevant here. FAR 8.404(a), 8.405-5(a), 38.101(e). In this respect, the FAR provides that contracting officers may, “in their discretion,” set aside orders or BPAs for any of the small business concerns identified in FAR part 19, *i.e.*, small businesses, 8(a) participants, Historically Underutilized Business Zone small business concerns, SDVOSB concerns, and economically disadvantaged women-owned small business concerns and women-owned small business concerns eligible under the WOSB program. FAR 8.405-5(a)(1), 19.502-4, 19.000(a)(3).

Our Office has explained that agencies are not required to follow the rule of two or other small business regulations under FAR part 19 when issuing orders or establishing BPAs under the FSS. See *American Relocation Connections, LLC*, B-416035, May 18, 2018, 2018 CPD ¶ 174 at 3-6 (dismissing protest for failing “to state a valid basis of protest because the agency is not required to set aside the solicitation for this FSS procurement.”); *Aldevra*, B-411752, Oct. 16, 2015, 2015 CPD ¶ 339 at 5-7 (denying protest that the agency was required to set aside FSS order for small business concerns); *Global Analytic Info. Tech. Servs., Inc.*, B-297200.3, Mar. 21, 2006, 2006 CPD ¶ 53 at 2 (denying protest because “the agency was not required to set the requirement aside in the first instance, and was not precluded from subsequently resoliciting the requirement on an unrestricted basis.”).

Nevertheless, the protester contends FAR section 8.405-5(a)(1) requires application of the provisions of FAR part 19 when an agency elects to set aside an FSS order. Comments at 2. In this connection, FRS notes that FAR section 8.405-5 permits the agency to set aside an FSS procurement for any small business program and asserts that “the plain language of 48 CFR § 8.405-5(a)(1) speaks to ‘eligible’ small businesses by pointing to 48 CFR § 19.000(a)(3),” listing the small business programs identified above.⁴ Comments at 2. In FRS’s view, if the eligibility requirements for small business

⁴ The FAR is codified at title 48 of the Code of Federal Regulations.

programs in FAR part 19 apply when the government decides to set aside an FSS procurement, then all the provisions of part 19 apply to the procurement. *Id.*

We disagree. As noted above, the agency conducted this procurement as an FSS acquisition under FAR part 8.4. FAR section 8.404(a) specifically provides that FAR part 19, Small Business Programs, does “not apply” (except under circumstances not relevant here) to orders placed against FSS contracts. Thus, HHS was not required to set the requirement aside in the first instance.

Moreover, FAR section 8.405-5(a) states that

(a) Although the preference programs of part 19 are not mandatory in this subpart, in accordance with section 1331 of Public Law 111-240 (15 U.S.C. 644(r))-

(1) Ordering activity contracting officers may, at their discretion-

(i) Set aside orders for any of the small business concerns identified in 19.000(a)(3); and

(ii) Set aside BPAs for any of the small business concerns identified in 19.000(a)(3).

(2) When setting aside orders and BPAs-

(i) Follow the ordering procedures for Federal Supply Schedules at 8.405-1, 8.405-2, and 8.405-3; and

(ii) The specific small business program eligibility requirements identified in part 19 apply.

FAR 8.405-5(a). Here, the FAR identifies the types of set-asides for small business concerns and directs the ordering activity to use the small business programs’ eligibility requirements. This section of the FAR provides no other directions about using procedures from FAR part 19; instead, the regulation explicitly directs the agency to follow the ordering procedures for FSS procurements under FAR subpart 8.4. We find nothing in FAR section 8.405-5 that requires HHS to use the procedures set forth in FAR section 19.502-9 for withdrawing a small business set-aside, or any other FAR part 19 procedures, before determining to cancel an FSS procurement set aside for small businesses.

In sum, we conclude that the contracting officer here had both the discretion to set aside this FSS procurement for small businesses in the first instance and the discretion to withdraw the set aside. We also conclude the agency was not required to follow FAR part 19 procedures after deciding to resolicit the requirement on an unrestricted basis. We therefore find that FRS’s argument fails to state adequate legal grounds of protest

and dismiss it on that basis. See 4 C.F.R. § 21.5(f). For this reason, we also dismiss the protester's argument that the agency failed to notify the SBA of the agency's decision to cancel the set-aside in accordance with FAR section 19.502-9.

The protest is dismissed.

Edda Emmanuelli Perez
General Counsel